Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS AND JAMES MATHEWS, *Petitioners*

vs.

HARRIS METHODIST, FORT WORTH, A NON-PROFIT CORPORATION; TARRANT-PARKER COUNTY MEDICAL EXAMINERS DISTRICT; and LIONS ORGAN AND EYE BANK, DISTRICT 2E2, A TEXAS CORPORATION, *Respondents*

Respondent Lions Organ and Eye Bank, District 2E2, Inc.'s

Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court of the State of Texas

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II. The procedures established for notification of dismissal for lack of prosecution under Rule 165a, Texas Rules of Civil Procedure and Rule 306a, Texas Rules of Civil Procedure, providing that time periods for appeal run on dismissals even where there has been no notice of the dismissal, are not violative of due process of law as guaranteed by the 14th Amendment to the United States Constitution.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

LIONS ORGAN AND EYE BANK, DISTRICT 2E2, INC., Respondent herein, prays that the Petition for Writ of Certiorari heretofore filed by EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS and JAMES MATHEWS, be denied.

STATEMENT OF THE CASE

Other than containing unjustified and unsupported conclusions, Petitioners' Statement of the Case is essentially correct. However, for the convenience of the Court, the basic factual and procedural information pertinent to the Court's disposition of this case may be clearly and concisely stated as follows:

December 6, 1987	Petitioners' brother died as a result of injuries suffered in an automobile accident.
August 7, 1989	Petitioners sued the Respondents in the 153rd District Court of Tarrant County, Texas, alleging that Respondents were liable to them under various theories for removing the corneas from their deceased brother's eyes without their consent.
September 28, 1990	The Tarrant County District Court dismissed the case for want of prosecution.
March 1991	Petitioners learned the case had been dismissed.
March 28, 1991	Petitioners filed an equitable bill of review in the 153rd District Court of Tarrant County, Texas, seeking reinstatement of the case on the basis that they had no notice of the dismissal.
September 13, 1991	Petitioners' bill of review was denied.

July 22, 1992	The Court of Appeals for the Second Court of Appeals District of Texas affirmed the trial court's denial of the bill of review.
November 4, 1992	The Texas Supreme Court denied Petitioners' Application for Writ of Error.
December 2, 1992	The Texas Supreme Court denied Petitioners' Motion for Rehearing.

STATEMENT, ARGUMENT AND AUTHORITIES

This Petition for Writ of Certiorari should be denied for the following reasons:

I. The refusal of the Texas Court of Appeals and the Texas Supreme Court to reinstate Petitioners' cause of action after its dismissal at a time when the applicable statute of limitations prevented refiling did not deprive the Petitioners of due process of law under the 14th Amendment to the United States Constitution and does not conflict with this Court's opinion in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 99 L. Ed. 2d 75, 108 S.Ct. 896 (1988).

II. The procedures established for notification of dismissal for lack of prosecution under Rule 165a, Texas Rules of Civil Procedure and Rule 306a, Texas Rules of Civil Procedure, providing that time periods for appeal run on dismissals even where there has been no notice of the dismissal, are not violative of due process of law as guaranteed by the 14th Amendment to the United States Constitution.

Petitioners correctly state that Rule 165a of the Texas Rules of Civil Procedure establishes the procedure for dis-

missal for want of prosecution in Texas. It provides that notice of dismissal is to be sent to the attorneys, and it further provides that failure to mail the notice *does not* affect the time periods set out in Rule 306a, Texas Rules of Civil Procedure. Rule 306a also provides that all applicable time periods begin to run when the judgment is signed.

Rules 165a and 306a provide motions to reinstate causes dismissed for want of prosecution must be filed within thirty days after the order of dismissal is signed. Under Rule 306a, the running of this thirty day period is tolled for ninety days where a party has had no notice of dismissal. Consequently, in such cases, the judgment is final 120 days after it is signed, even if the parties have had no notice of the dismissal. Thereafter, review may be had only by bill of review filed pursuant to Rule 329b(f), Texas Rules of Civil Procedure.

Petitioners do not dispute the authority of a trial court to dismiss a case for want of prosecution. The sole factual basis which Petitioners relied upon in the Courts below and which they rely upon in their Petition for Writ of Certiorari is that neither Petitioners nor their then attorney, Edmund Brown, received a copy of the Notice of Dismissal sent by the Tarrant County District Court. Petitioners do not and cannot affirmatively establish that the notice was not sent; they only establish that it was not received. The opinion of the Court of Appeals for the Second Court of Appeals District of Texas accurately recounts the events surrounding the notice issue:

> ". . . The original lawsuit was filed by a lawyer named Edmund Brown in August 1989. Brown testified that he subsequently engaged in discovery for a number of months, including interrogatories and production requests. Brown then ceased discovery in January 1990 because he decided to involve another lawyer in the case with more experience. He contacted other lawyers and Laurance Priddy agreed to take the case. Priddy

> received contractual documents regarding entering the case in January 1991 and filed his motion to be substituted as counsel in March 1991. Upon filing, Priddy was advised the case had been dismissed and notified Brown of this fact. Brown testified that he had no notice of the dismissal until being advised by Priddy in March 1991. Brown also testified that when the litigation started, he officed in the Fort Worth Club Tower but had subsequently moved to another location and had provided notice to the post office. After providing the post office with a change of address, he continued to receive mail forwarded from his previous address but never received notice that this case was on the dismissal docket or had been dismissed. Brown did not notify the court or opposing counsel of his address change because he anticipated obtaining alternate counsel. Brown makes no contention that any of appellees did anything wrongful or fraudulent causing the dismissal." 834 S.W. 2d at 584.

Petitioners then used these facts to urge that "permitting a dismissal under Rule 165a of the Texas Rules of Civil Procedure to become final through the operation of the time period set out in Rule 306a and Rule 165a without requiring that the parties affected have actual notice of the dismissal is unconstitutional, just like the default procedures addressed by this [C]ourt [in] *Peralta*."

Contrary to Petitioners' assertions, *Peralta v. Heights Medical Center Inc.*, 485 U.S. 80, 99 L. Ed. 2d 75, 108 S.Ct. 896 (1988) is inapplicable to this case. It involved a default judgment taken against a defendant without notice or service. This Court held that "a judgment entered without notice or service is constitutionally infirm" because "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity

to present their objections." 485 U.S. at 84. As rationale for this holding, the Court further stated:

> ". . . As appellant asserts, had he had notice of the suit, he might have impleaded the employee whose debt had been guaranteed, worked out a settlement, or paid the debt. He would also have preferred to sell his property himself in order to raise funds rather than to suffer it sold at a constable's auction.
>
> "Nor is there any doubt that the entry of the judgment itself had serious consequences. It is not denied that the judgment was entered on the county records, became a lien on appellant's property, and was the basis for issuance of a writ of execution under which appellant's property was promptly sold without notice. Even if no execution sale had yet occurred, the lien encumbered the property and impaired appellant's ability to mortgage or alienate it; and state procedures for creating and enforcing such liens are subject to the strictures of due process. [citations omitted]" 485 U.S. at 85.

Respondent respectfully submits there is a tremendous difference between the taking of a default judgment and the case at bar. In *Peralta*, the default judgment was entered against a Defendant who had never been properly served with process and, then, the Defendant was not given notice of the judgment. Consequently, that Defendant never made an appearance in the litigation or otherwise subjected himself to the jurisdiction of the Court. In the case at bar, however, the Petitioners brought the lawsuit, thereby invoking the jurisdiction of the Court, subjecting themselves to its rules and regulations, and obligating their attorney under Rule 8, Texas Rules of Civil Procedure, to notify the Court of any change in his address.

The Court of Appeals for the Second Court of Appeals District of Texas properly recognized the distinction between the

case at bar and the default judgment addressed in *Peralta* by holding that Petitioners' rights of due process had not been violated, stating:

> ". . . we find that the cases cited for the proposition that appellants were deprived of their right to due process inapplicable. *Peralta* involved a defendant who had no service of process and had not submitted to the jurisdiction of the court; it is much more easily understood how that party was deprived of his right to due process as opposed to appellants who filed suit themselves, invoked the jurisdiction of the court and then failed to give that court notice of where they could be reached. The *Lopez* decision involved a defendant who was never notified of a trial setting and consequently, failed to appear. The gravity of the lack of notice in these cases is more readily apparent than in the present case. These decisions in *Peralta* and *Lopez* involve a complete lack of notice without fault of the party who did not receive notice. In the present case it cannot be said that appellants' attorney was without fault because he knew that he had a case pending yet failed to give the district court notice of his address."

The weakness of Petitioners' due process argument is perhaps best demonstrated by comparing the Texas Rules of Civil Procedure utilized in the case at bar to the Federal Rules of Civil Procedure and cases construing their constitutionality. Rule 41, F.R.C.P., which governs the dismissal of federal cases, is very similar to Rule 165a of the Texas Rules of Civil Procedure. In *Link v. Wabash R. Co.*, 370 U.S. 626 (1962), this Court interpreted Rule 41, F.R.C.P., to allow a court to dismiss a case for want of prosecution on its own motion, stating:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke

> this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. . . . The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 370 U.S. 629-31.

Not only does *Link*, *supra*, authorize the dismissal of a case for want of prosecution, it also addresses the due process argument raised by Petitioners in the case at bar. It states:

> "Nor does the absence of notice as to the possibility of dismissal or the failure to hold an adversary hearing necessarily render such a dismissal void. It is true, of course, that 'the fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.' [citation omitted] But this does not mean that every order entered without notice and a preliminary adversary hearing offends due process. *The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.*" 370 U.S. at 632. (emphasis added)

This holding strongly supports the holding and rationale of the Texas Court of Appeals referred to hereinabove that "it cannot be said that [Petitioners'] attorney was without fault because he knew that he had a case pending yet failed to give the district court notice of his [new] address."

Other federal rules which are similar to the Texas rules of procedure include Rule 77(d), F.R.C.P., and Rule 4(a)(6),

F.R.A.P. Rule 77(d), F.R.C.P., which is similar to Rule 165a, T.R.C.P., provides:

> "Immediately upon the entry of an order or judgment the clerk shall service a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. *Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.*" (emphasis added)

Rule 4(a)(6), F.R.A.P., like Rule 306a, T.R.C.P., extends the time before a judgment or order becomes final in instances where notice is not given by providing:

> "The district court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, *may* upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal." (emphasis added)

The only substantial difference between Rule 4(a)(6), F.R.A.P., and Rule 306a, T.R.C.P., is that the federal rule provides a window of opportunity for 180 days after entry of the judgment or order complained of, while the Texas rule provides 120 days. With regard to Rule 4(a)(6), F.R.A.P., it is important to note that this rule was promulgated in 1991, thirty years after *Link v. Wabash R. Co.*, *supra*, was decided. Consequently, if due process existed in 1961 when this provi-

sion for lengthening the time to pursue an appeal did not exist, surely due process is accorded litigants under Rule 306a, T.R.C.P., and Rule 4(a)(6), F.R.A.P., which both provide an opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the court, is either not received by a party or is received so late as to impair the opportunity to pursue relief therefrom.

CONCLUSION

The judicial system requires that Trial Courts be allowed, within reasonable limitations, to control their dockets by dismissing those cases where plaintiffs have demonstrated a lack of good faith effort to pursue their claims. Texas Rules of Civil Procedure 165a and 306a, like Rules 41 and 77, F.R.C.P., and Rule 4(a)(6), F.R.A.P., establish those reasonable limitations.

The Texas Rules allow a plaintiff every opportunity to prevent such a dismissal. The plaintiff is given notice before the case is dismissed. In the case at bar, a telephone call, a letter, a request for a trial setting, a conference with the Court, or any of a number of other reasonable activities by Petitioners' attorney would have prevented this case from being dismissed. If, for whatever reason, Petitioners failed to discover the dismissal until after the fact, they were given a second chance because notice of the dismissal was sent to their attorney. Had they have come forward within 30 days, they would have only had to prove that the dismissal was not the result of their conscious indifference. In those rare instances where a party does not receive notice, the Texas Rules provide for an additional 90 days in which to move for reinstatement under the lesser standard. As the Court of Appeals for the Second Court of Appeals District of Texas states, any attorney with pending litigation has to be charged with knowledge of those

rules and the necessity to comply with them, especially if the attorney changes his address.

For the foregoing reasons, Respondent LIONS ORGAN AND EYE BANK, DISTRICT 2E2, INC., prays that the Petition for Writ of Certiorari heretofore filed by EDWARD MATHEWS, BEARL MATHEWS, NEHEMIA MATHEWS, NATHAN MATHEWS and JAMES MATHEWS, be denied.

Respectfully submitted

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